

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

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**PEOPLE OF THE STATE OF MICHIGAN,**  
**PLAINTIFF-APPELLANT,**

**v**

**JAMES RICHARD LARGE,**  
**DEFENDANT-APPELLEE.**

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**SUPREME COURT NO. 127142**

**COURT OF APPEALS NO. 253261**

**LOWER COURT NO. 03-000895-FH**

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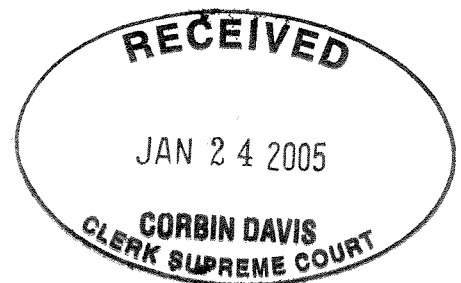
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**APPELLANT'S BRIEF**

**ORAL ARGUMENT REQUESTED**

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**STATEMENT OF THE QUESTIONS PRESENTED**

**I.**

**WHERE DEFENDANT DROVE DRUNK AND KILLED A BICYCLIST, IS HE PROPERLY CHARGED WITH OUIL CAUSING DEATH, "BY THE OPERATION OF THAT MOTOR VEHICLE CAUSES THE DEATH OF ANOTHER PERSON"?**

**THE TRIAL COURT ANSWERED: NO**

**PLAINTIFF-APPELLANT ANSWERS: YES.**

**II.**

**WHERE DEFENDANT WAS DRUNK DRIVING AND SPEEDING, DID THE TRIAL COURT LEGALLY ERR IN FINDING AN ABUSE OF DISCRETION FOR BINDING OVER ON MANSLAUGHTER?**

**THE TRIAL COURT ANSWERED: NO**

**PLAINTIFF-APPELLANT ANSWERS: YES.**

## **STATEMENT OF FACTS**

Plaintiff originally charged defendant with Involuntary Manslaughter, MCL 750.321, OUIL Causing Death, MCL 257.625(4), OUIL, second offense, MCL 257.625(1), and Driving Outside License Restrictions, MCL 257.312. On July 16, 2003, while driving with a .10 blood-alcohol content and outside his license restrictions, defendant struck and killed Cody Otto. (36a, 156a). Exhibits 2 and 8 show the accident. (225a, 226a). Defendant was driving over 60 MPH (in a 55 zone) at the time. (166a, 178a). At the time, Cody was driving a bicycle without brakes. (130a). She drove down her driveway onto the street. (130a). Given that the driveway is steep and cut into the hill with vegetation and trees, defendant would not have been able to see her coming down. (197a). From the point that Cody rode onto the road, it would not have mattered if defendant had slowed down. (198a-199a, 216a). It also did not matter that he had been straddling the center line beforehand. (209a).

Twelfth District Court Judge Lysle Hall bound over on all charges except the OUIL Causing Death. (223a). In Circuit Court, both parties filed a motion. Plaintiff asked that the OUIL Causing Death charge be reinstated. Defendant asked that the Involuntary Manslaughter charge be dismissed. In an Opinion and Order dated December 18, 2003, Jackson County Circuit Court Judge Chad Schmucker denied plaintiff's motion and granted defendant's motion and then remanded the case to the District Court on the two remaining misdemeanor charges. (227a-231a). Then, after having granted leave to appeal (232a), on August 10, 2004, the Court of Appeals affirmed. (233a-236a). This Court then granted leave to appeal on November 29, 2004 (237a), in an order stating:

The parties are directed to include among the issues to be briefed: (1) whether the “substantial” cause language in People v Lardie, 452 Mich 231; 651 NW2d 656 (1996), is consistent with the statute; (2) whether MCL 257.625(4)’s requirement that the prosecutor establish that the defendant’s “operation of that motor vehicle causes the death of another person” requires the prosecutor to establish that the defendant’s operation of the motor vehicle was affected by his intoxicated state; (3) whether the statute obligates the prosecutor to show that the defendant’s driving at the time of the accident was a proximate cause of another person’s death; (4) whether it is sufficient that the prosecutor establish only that the defendant decided to drive while intoxicated, and that a death resulted; and (5) if so, whether the statute violates the equal protection clause of the Michigan Constitution, Const 1963, art 1, § 2, or the equal protection clause of the Federal Constitution AN XIV, or is otherwise unconstitutional.

This Court then consolidated this case with People v Schaefer, \_\_\_\_ Mich \_\_\_\_; 689 NW2d 230 (2004).

## ARGUMENT

### I.

**A STATUTE THAT SAYS “BY THE OPERATION OF THAT MOTOR VEHICLE CAUSES THE DEATH OF ANOTHER PERSON” DOES NOT REQUIRE THAT THE INTOXICATION ITSELF CAUSE THE DEATH.**

“The court is not to be an überlegislature.” The Limited, Inc v Comm’r of Internal Revenue, 286 F3d 324, 333, 336 (CA 6, 2002).

As this Court has said numerous times, in interpreting a statute, the courts are to use the statute’s plain language. Where that language is unambiguous, no court has the authority to engraft on an extra element. This statute’s plain text says that the driving, and not the intoxication, causes the death. Cases from other jurisdictions with similar statutes have ruled this way. This Court should overrule its 1996 opinion that legislatively engrafted an element not found in the statute’s text. It should reverse and remand with instructions that this case be bound over for trial on the OUIL causing death charge.

This Court reviews de novo whether or not the alleged conduct falls within the statute’s scope. People v Thomas, 438 Mich 448, 452; 475 NW2d 288 (1991). Rickner v Frederick, 459 Mich 371, 378; 590 NW2d 288 (1999), outlines this Court’s task in interpreting statutes:

An anchoring principle of our jurisprudence, and the foremost rule of construction, is that we are to effect the intent of the Legislature. In doing so, we begin with the language of the statute – if the Legislature has crafted a clear and unambiguous provision, we assume that the plain meaning

was intended, and we enforce the statute as written.

The OUIL causing death statute, MCL 257.625(4), says:<sup>1</sup>

A person . . . who operates a motor vehicle in violation of subsection (1) or (3) [either while intoxicated or with a .10 or more blood/alcohol level] and by the operation of that motor vehicle causes the death of another person is guilty . . . .

To state the obvious, this statute does not say that the intoxication caused the death. Instead, it says that the driving caused the death.

This statute sets up “cause in fact” as the causation element. This statute does not say “the drunken operation of that motor vehicle causes the death” nor does it say “proximately causes” nor even “substantially causes.” Instead, it says merely “by the operation of that motor vehicle causes the death.” The Legislature wrote this statute about as broadly as it could. Merely the car’s operation causes the death as long as the operator is intoxicated. It does not require either negligence or any fault.

The Legislature intended a broad scope by using the word “cause,” a very broad term. Black’s Law Dictionary, 6<sup>th</sup> ed, defines “cause” as: “To be the cause or occasion of; to effect as an agent; to bring about; to bring into existence; to make to induce; to compel.” Merriam Webster’s Collegiate Dictionary, 10<sup>th</sup> ed, defines “cause” as: “to serve as a cause or occasion of; to effect by command, authority, or force.” Webster’s New Universal Unabridged Dictionary defines “cause” as: “effect, make, create, produce.” Nothing in any of these definitions contains either “proximate” or “significant.” By using “cause” without any modifiers at all, the Legislature intended that the reach be as broad

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<sup>1</sup>The subsequent statutory amendments have not affected this aspect.

as possible. All that matters is that, but for the defendant's operating a vehicle (while he just happened to be drunk) a person would not have died. The only limit is foreseeability. Only where an intervening cause, either through someone else's intentional or grossly negligent act caused the death will the defendant not be culpable. Thus, a common sense reading precludes any "cause" which is merely de minimus. Of course, in the present case, Cody Otto's darting out is foreseeable. It is merely simple negligence. Defendant's driving is not de minimus. But for defendant's driving that car (while he was drunk), Cody would still be alive. The operation of his car killed her. The statute requires no more.

A comparison with three particular things shows that the Legislature in fact intended the above and that an extra element has since been engrafted onto the statute. First, the Court of Appeals' decision in the consolidated case, People v Schaefer, docket no. 245175, released 3/25/04, makes that point about as clearly as possible. In Schaefer, even though the judge read the statute to the jury, the Court of Appeals reversed because an element was missing. Where did that element come from if it was not judicially engrafted onto this statute?

Second, the driving on a suspended license causing death statute, MCL 257.904(4), also shows that the causation element is merely a disqualified person operating the vehicle and not the disqualification somehow affecting the driving. This statute is very similar to the drunk driving causing death statute:

A person who operates a motor vehicle [on a suspended license] and who, by operation of that motor vehicle, causes the death of another person is guilty. . . .

This statute is likewise a "cause in fact" statute. As long as the driver has a suspended

license, all that matters is that his operating the car caused someone to die. No one would even think of saying that this statute really means that the person's not having a license somehow affected his driving in such a way that death resulted. Such a reading, of course, is patently absurd. Therefore, as the sentence structure between the two is precisely the same, why interpret the OUIL causing death statute differently?

Third, a comparison with Canada's statute also shows that Michigan's Legislature did not intend that the drunkenness be the causal element. Like Michigan, in Canada, one may drive while drunk in two different ways:

- (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
- (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred milliliters of blood. MCC 253.

On the other hand, unlike Michigan, Canada's statute restricts causing death to only one of these alternatives, subsection (a), actual impaired driving:

- (2) Every one who commits an offense under paragraph 253(a) and thereby causes bodily harm to any other person is guilty of an indictable offense and liable to imprisonment for a term not exceeding ten years. MCC 255(2).

Michigan in fact, proscribes two different forms of drunk driving, (1) under the influence or impaired, MCL 257.625(1)(a), and (3), and (2) per se, MCL 257.625(1)(b). The difference between the two, of course, is the effect on the driving. While driving under the influence or impaired requires an effect on the driving, per se does not. People v Calvin,

216 Mich App 403; 548 NW2d 720 (1996), lv den, 454 Mich 859; 558 NW2d 729 (1997).

In other words, a person may still be guilty of MCL 257.625(1)(b) even if the alcohol had absolutely no effect on the driving.

Michigan in fact does not distinguish between the two in its OUIL causing death statute:

A person . . . who operates a motor vehicle in violation of subsection (1) or (3) and by the operation of that motor vehicle causes the death of another person is guilty . . . . MCL 257.625(4).

Therefore, where does this added element come from, that the intoxication must have produced a change in the driving which caused the death? It has been completely made up. A subsection (1)(b) violation does not require any affect on the driving at all. Violating (1)(b) satisfies the first clause. The second clause, of course, does not even mention intoxication.

Thus, nothing in the statute requires that the intoxication produced any change in the driving at all. Since subsection (1)(b) does not so require, how is it possible that subsection (4), then requires it (even though it adds nothing more to subsection (1)(b) than a death results)?

In any event, a look at other States' statutes also shows that the Legislature did not intend this added element. After all, like many other states, it could have made the causation element a lot stricter if it had wanted to. Plenty of other words and phrases could have been used that were not used. For example, Texas' statute blatantly spells out that the intoxication effect must have caused the death, and not merely the operation: "by

accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual.” TPC 19.05(a)(2). If Michigan in fact had wanted this extra element, it would have said so in words that did not denote precisely the opposite.

Likewise, numerous other statutes add modifiers not found in Michigan’s statute. For example, South Dakota’s statute, SDCL 22-16-41, requires that the vehicle be driven “in a negligent manner.” In addition, many of these statutes modify the word “cause” with words like “proximately” or “substantially.” Michigan’s Legislature, on the other hand, chose not to do so. No other State more clearly states that the operation, not the intoxication, causes the death.

Most obvious is Wisconsin’s statute. WS 940.09(2)(a) actually allows an affirmative defense if death would have occurred even if the driver had been operating with due care or had not been drunk. Michigan, on the other hand, does not have any such statute. Although it certainly could have put one in, it chose not to.

Yet, even though no other statute is more clear on this point than Michigan’s, most States have still concluded that the causal requirement is between the driving and the death and not between the intoxication and the death. For example, Florida’s statute has the phrase in it, “and if the death of any human being caused by the operation of a motor vehicle by any person while intoxicated.” In State v Van Hubbard, 751 So 2d 552, 560, 561 (Fla 1999), the Florida Supreme Court specifically concluded that the prosecution need prove only that the car’s operation and not the drinking caused the death:

The legislature has determined that combining the operation

of a motor vehicle with being in an intoxicated state is conduct which is malum prohibitum and is pervasively antisocial. Since the conduct is considered inherently evil, it conceptually cannot be divided into portions which are bad and portions which are not bad. [The statute] entitled "Operating under the influence of intoxicants" is violated by a person who, one, operates a motor vehicle and two, is at the time under the influence of an intoxicant. The commission of the offense does not require any erratic or negligent driving. Because driving under the influence of an intoxicant is malum prohibitum, it is impossible to separate the intoxication from the driving or the driving from the intoxication. The result is the potentially lethal and illegal combination of driving while intoxicated.

[The statute] requires that the prosecution prove and the jury find beyond a reasonable doubt a causal connection between the defendant's unlawful conduct, operation of a motor vehicle while intoxicated, and the victim's death. The statute does not include as an element of the crime a direct causal connection between the fact of defendant's intoxication, conceptualized as an isolated act, and the victim's death. Under this statute there is an inherently dangerous activity in which it is reasonably foreseeable that driving while intoxicated may result in the death of an individual. The legislature has determined this activity so inherently dangerous that proof of it need not require a causal connection between the defendant's intoxication and the death.

So, when a person chooses to operate an automobile while under the influence of intoxicants and has done so deliberately knowing that society has through its legislature established such combined atrocities as dangerous and when such operation results in death, it may be punished as a felony.

\* \* \*

The people of this state through their legislature have determined [in this statute] that the operation of a motor vehicle by one who is under the influence of intoxicants is a risk that will not be tolerated.

Wisconsin has a similar statute. WS 940.09(1)(a). The defendant is guilty

if he “causes the death of another by the operation. . . of a vehicle. . . while under the influence. . . .” In State v Caivaiousai, 122 Wis 2d 587, 594-595; 363 NW2d 574 (1985), the Wisconsin Supreme Court ruled that the statute requires no causal connection between the intoxication and the death. It requires nothing more than a causal connection between the operation and the death: “Not requiring a specific causal connection between the defendant’s intoxicated driving and the victim’s death. . . . requiring only. . . the victim’s death was caused by the operation of a vehicle while the operator is intoxicated.”

Colorado’s statute says: “If a person operates or drives a motor vehicle under the influence . . . and such conduct is the proximate cause of the death of another, he commits vehicular homicide. This is a strict liability crime.” CRS 18-3-106(1). In People v Garner, 781 P2d 87, 89 (Colo 1989), the Colorado Supreme Court also found that this statute requires nothing more than a (proximate cause) causal connection between the operation and the death:

The statute does not require evidence that the intoxication affected the driver’s operation in a manner that results in a collision. The clear intent of the legislature is to punish and thereby deter the conduct of voluntarily driving while intoxicated.

Accordingly, the Colorado Supreme Court reversed the lower court’s decisions not to bind the case over for trial.

Washington’s statute says “as a proximate result of injury proximately caused by the driving of any vehicle by any person while under the influence.” RCW 46.61.520. In State v Rivas, 126 Wash 2d 443; 896 P2d 57 (1995), the Washington Supreme Court

overruled prior decisions that had engrafted on a requirement that the causation be between the intoxication and the death. It stated:

The Legislature did state . . . , as clearly as possible, that the only causal connection which the State is required to prove is the connection between the act of driving and the accident. 126 Wash 2d 451.

The Indiana Supreme Court has also overruled a previous decision. Michinski v State, 487 NE2d 150, 154 (Ind 1986), pointed out that nothing in Indiana's statute requires any causal link between the intoxication and the injury.

Plaintiff, of course, challenges anyone to find such a causation requirement in the statute's text. Instead, it says as clearly as conceivably possible, that the operation (not even the drunken operation) of the vehicle causes the death. This statute is even clearer on this point than the statutes that the other jurisdictions found to be sufficiently clear to not require such an added causal element.

Accordingly, Justice Weaver's concurrence in Lardie correctly interpreted this statute. She first pointed out the proper legislative interpretation test:

The plain language of the statute clearly indicates that the Legislature intended causation to turn on the fact that the defendant operated the vehicle while intoxicated, rather than the changed manner in which, or how, the defendant operated the vehicle while intoxicated. Therefore, the defendant's culpability arises and should be evaluated in light of the defendant's culpable decision to drive while intoxicated.

Unlike statutes, discussed below, that prohibit similar conduct, the clear language of the OUIL causing death statute contains no reference to the manner in which the defendant operated the vehicle.

Justice Weaver went on to use this proper test in interpreting the statute and used an analysis echoing the analysis quoted above:

However, the OUIL causing death statute does not contain similar language that manifests a legislative intent to tie causation to the specific manner of operation. Instead, the language in this statute indicates that the people need only prove that the defendant's operation of the vehicle while intoxicated, not the defendant's uncharacteristic and intoxicated operation, was a cause of the victim's death.

In enacting the statute, the Legislature sought to prohibit and punish all intoxicated driving that results in a fatality, not just intoxicated driving that is performed in a manner that the people can prove is different from that particular defendant's typical and sober operation of a vehicle in the same situation. The statute is aimed at prevention and deterrence. . . . The majority's definition of causation creates an unintended loophole and diminishes the chances of swift and sure punishment by requiring the people to prove that, in a similar situation, that particular defendant, if sober, would not have caused the death.

\* \* \*

The Legislature drafted the statute so that the intoxicated driver would be responsible for all consequences that flow from his decision to drive while intoxicated. The majority's determination that the defendant's "drunken driving" must be a substantial cause of the victim's death significantly frustrates the Legislature's intent to prevent intoxicating driving, which always has the potential to result in death. 551 NW2d 674-676. (Footnotes omitted.)<sup>2</sup>

Just last term, in People v Lively, 470 Mich 248, 255; 680 NW2d 878 (2004), this Court used a similar analysis in overruling a string of cases going back to 1848.

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<sup>2</sup>Justice Weaver agreed with the Court of Appeals on this point. 551 NW2d 674. Justice Kelly signed the Court of Appeals opinion.

It found that the Court had improperly added on a materiality element to the perjury statute. It specifically pointed out the Legislature could have used different language if it had meant other than what it had said. 470 Mich 253. It also looked at other states and noticed similar decisions in similar situations. 470 Mich 256-257, n 10.<sup>3</sup>

In the present case, plaintiff asks this Court to overrule only one, People v Lardie, 452 Mich 231; 551 NW2d 656, 668-669 (1996), which says that the prosecutor must show more than what the statute says, more than that a defendant drove while drunk and killed someone: "Therefore in proving causation, the people must establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim."

To a very large extent, the majority in Lardie decided as it did only because otherwise "[s]uch an interpretation of the statute would provide an absurd result." 551 NW2d 668.

Three years later, however, this Court unanimously disavowed such an analysis. People v McIntire, 461 Mich 147; 599 NW2d 102 (1999), signaled a change in this Court's statutory interpretation analysis:

[We] agree with Justice Scalia's description of such attempts to divine unexpressed and nontextual legislative intent as "nothing but an invitation to judicial law making." . . . This nontextual approach to statutory construction has unfortunately led . . . away from the task of determining the Legislature's expressed intent. 461 Mich 155, n 8.

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<sup>3</sup>Lively ruled as it did even though the perjury statute had been amended a few times since the original ruling engrafting on a materiality element.

Instead, the new statutory instruction analysis requires the court to stop when the language is clear and unambiguous:

A fundamental principle of statutory construction is that “a clear and unambiguous statute leaves no room for judicial construction or interpretation,” [Citation omitted.] When a Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. [Citations omitted]. Finally, in construing a statute, we must give the words used by the Legislature their common, ordinary meaning. MCL 8.3a. 461 Mich 153.

As it is, Justice Weaver’s interpretation is not in fact absurd. As pointed out above and in Miller v State, 236 Ga App 825, 828, n 4; 513 SE2d 27 (1999), cert den 7/2/99, “[t]he majority of courts in other states which have been presented with the question have held that their vehicular homicide statutes require proof of a causal connection [between only] the defendant’s act of driving and the victim’s death rather than between the defendant’s intoxication and the death.”

Accordingly, this Court’s questions can be answered:

- (1) Whether the “substantial” cause language in [Lardie], is consistent with the statute? No. It engrafts on an element nowhere found in the statute’s language.
- (2) Whether MCL 257.625(4)’s requirement that the prosecutor establish that the defendant’s “operation of that motor vehicle causes the death of another person” requires the prosecutor to establish that the defendant’s operation of the motor vehicle was affected by his intoxicated state? No. To do so would be to violate the statute’s plain language.

(3) Whether the statute obligates the prosecutor to show that the defendant's driving at the time of the accident was a proximate cause of another person's death? No. If the Legislature had intended that it be the proximate cause, it would have used the word "proximately" to modify "cause."

(4) Whether it is sufficient that the prosecutor establish only that the defendant decided to drive while intoxicated, and that a death resulted? Yes, as long as the operation is not causally de minimus and the death is sufficiently foreseeable from driving the car. Such a defendant should not be held responsible for a death that results from someone else's grossly negligent or intentional act.<sup>4</sup>

(5) If so, whether the statute violates the equal protection clause of the Michigan Constitution, Const 1963, art 1, § 2, or the equal protection clause of the Federal Constitution, Am XIV, or is otherwise unconstitutional? No. Unfortunately, however, plaintiff cannot in depth analyze any equal protection claim. Not only have none of the lower courts addressed any such issue, but defendant has never raised such an issue

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<sup>4</sup>State v Benoit, 650 A2d 1230 (RI 1994), exemplifies the distinction. There, while legally drunk, the defendant was driving on the highway with a passenger. Another car then crossed over in front of him and struck him (even though he tried to avoid it). Although, the Rhode Island Supreme Court specifically pointed out that the intoxication is not a causal element, 650 A2d 1233, it also found no criminal responsibility in the death. The defendant's driving did not proximately cause the passenger's death. Instead, an intervening cause occurred, the other driver's gross negligence. Although a child darting out into traffic is sufficiently foreseeable, another car crossing over into oncoming traffic is not.

Rhode Island's statute states: "When the death of any person other than the operator ensues as a proximate result of an injury received by the operation of any vehicle, the operator of which is under the influence of any intoxicating liquor. . . ." RIGL 31-27-2.2(a).

himself. This Court usually does not address issues that the lower court did not address. Although this Court has the authority to decide the issue without any input from the lower courts, it will usually remand to have them first consider the matter. First, McCready v Hoffius, 459 Mich 1235; 593 NW2d 545 (1999).

Hence, as long as defendant himself has not yet made an equal protection claim, plaintiff is in the same situation as the Colorado Supreme Court in People v Rostad, 669 P2d 126, 130, n 6 (Colo 1983) where the “defendant has not alleged that the statute creates a suspect classification or infringes upon a fundamental right.” Until defendant makes such a claim, plaintiff cannot adequately respond.

As it is, defendant’s only constitutional claim rests on dicta from Caivaiosai v Barrington, 643 F Supp 1007 (WD Wis 1986). In Caivaiosai, the federal district court rejected every constitutional challenge that the habeas petitioner brought. In his answer to the application, defendant relies on the following dicta:

It would be fundamentally unfair if [the statute] dispensed with the requirement that the state provide a causal connection between the defendant’s actions and the victim’s death. The state could not impose liability based upon mere coincidence of time and place and defendant’s behavior. Id.

Even properly interpreted, however, Michigan’s statute does not dispense with a causation requirement. Defendant driving drunk does not mean that he is criminally responsible for every death in the world that occurs thereafter. Instead, as the statute specifically states, the car’s operation must “cause” the death. As pointed out above, he is criminally responsible for any reasonably foreseeable accident. Someone else’s intentional act or gross negligence means that he no longer “caused” the death.

Hence, the following statement omitted from defendant's quote applies:  
"Here, however, where the wrongful conduct consists of the combined acts of intoxication and driving, fundamental fairness does not compel the state to prove the causal relationship between the victim's death and each component of the defendant's act." Id.

Justice Weaver said it right: "Any intoxicated driving is a violation of the duty all motorists owe to those with whom they share the road – to drive only when not intoxicated, or to suffer the consequences." 551 NW2d 676-677. The statute's common and ordinary meaning is that the operation causes the death and not the drunken operation. Any other kind of judicial interpretation is nothing but the court acting as an überlegislature. This Court should overrule Lardie on this point. Instead, all that is needed is that the operation of the car is a proximate cause of the death.

## ARGUMENT

### II.

#### **BECAUSE DEFENDANT'S SPEEDING MAY HAVE CAUSED THE VICTIM'S DEATH, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN BINDING OVER ON INVOLUNTARY MANSLAUGHTER.**

The trial court usurped the jury's function. (1) Just how long defendant had been speeding and (2) whether or not the child would have had sufficient time to evade the accident is for the jury to decide, not the trial judge.

In obtaining a bind over, all that plaintiff has to show is probable cause that a crime was committed and that defendant committed it. MCR 6.110(E); MCL 766.13. In fact, the evidence need not even be enough "to defeat a motion for directed verdict at the conclusion of the prosecution's case." People v Graves, 79 Mich App 103, 105; 261 NW2d 226 (1977). This Court reviews the district court for only an abuse of discretion and both the circuit court and Court of Appeals de novo. No abuse of discretion occurs if circumstantial evidence and reasonable inferences establish probable cause. People v Goecke, 457 Mich 442, 469; 579 NW2d 868 (1998). Manslaughter does not require that the defendant's actions be the proximate cause, just a proximate cause. People v Stewart (On Remand), 219 Mich App 38, 41; 555 NW2d 715 (1996), lv den 456 Mich 865; 568 NW2d 684 (1997).

In the present case, the district court did not abuse its discretion. A reasonable inference can be drawn that defendant's drunken driving proximately caused the death. Defendant was driving over 60 mph (in a 55 zone). (166a, 178a). A person

driving just three minutes at 60 mph is a full quarter mile beyond where he would have been had he gone merely the speed limit, 55 mph. The jury has the right to conclude that defendant had in fact been speeding, not only when Cody Otto darted onto the road, but also earlier. If he had been speeding earlier, a reasonable inference, he would not have even been anywhere close when Cody Otto went onto the road. Not only would Cody have had enough time to swerve away, but he would have had enough time to react. Defendant's driving while drunk is gross negligence. People v Allan, 158 Mich App 472; 404 NW2d 266, 267 (1997). The speeding is the lack of due care. The jury could conclude that, had defendant been driving the legal speed limit, no death would have occurred. If in fact defendant had been driving slower, the victim (albeit on a bicycle without brakes) could possibly have reacted quicker and swerved (and merely been injured rather than killed).

In People v Tims, 449 Mich 83; 534 NW2d 675 (1995), this Court affirmed in a sufficiently similar situation. At about 2:00 A.M., the defendant, driving while drunk, struck and killed a pedestrian who was crossing the road. The defendant was neither speeding nor driving erratically. The area was dark without lighting. This Court upheld the manslaughter conviction.

At the very least, whether or not defendant had been speeding and whether or not Cody Otto could have avoided the accident is a jury question. The circuit court does not get to make such a decision in a mere motion to quash. The district court did not abuse its discretion in deciding that the jury decides whether or not Cody Otto would have died had defendant not been speeding. This Court should also reverse on this count as

well.

**RELIEF**

**ACCORDINGLY**, plaintiff asks this Court to reverse and remand with instructions that the case be bound over for trial on both felony charges.

Respectfully submitted,

January 24, 2005

  
**JERROLD SCHROTENBOER (P33223)**  
**CHIEF APPELLATE ATTORNEY**

## ADDENDUM

California. Cal Pen Code 191.5(a): “in the driving of a vehicle [] while drunk and the killing was either the proximate result of an unlawful act, not amounting to a felony, and gross negligence, or the proximate result of the commission of an unlawful act which might produce death, in an unlawful manner, and with gross negligence.”

Colorado. CRS 18-3-106(1): “operates or drives a motor vehicle while under the influence of alcohol . . . and such conduct is the proximate cause of the death of another, such person commits vehicular homicide. This is a strict liability crime.”

Connecticut. CGS 53a-56b(a): “A person is guilty of manslaughter in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes the death of another person as the consequence of the effect of such liquor or drug.”

Florida. FAS 316.193(3): “who operates a vehicle [and] such operation causes or contributes to causing [the] death of any human being.”

Georgia. OCGA 40-6-393a: “without malice aforethought, cause the death of another through the violation of” the drunk driving statute.

Idaho. IC 18-4006: “the operation of a motor vehicle is a significant cause contributing to the death because of” the drunk driving.

Illinois. 625 ILCS 5/11-501: “if the person [while drunk driving] was involved in a motor vehicle . . . accident that resulted in the death of another person, when the violation [of drunk driving] was a proximate cause of death.”

Indiana. BISA 9-4-54(b)(2): “A person who operates a motor vehicle while

intoxicated commits a . . . class C felony if it results in the death of another person.”

Iowa. IC 707.6A(1): “Unintentionally cause the death of another by operating a motor vehicle while intoxicated.”

Kansas. KSA 21-3442: “Involuntary manslaughter while driving under the influence is the unintentional killing of a human being committed in the commission of . . . an act described in” the drunk driving statute.

Kentucky. KRS 189A.010(11)(c): “Operating a vehicle that causes an accident resulting in death . . .”

Louisiana. LRS 14:32:1: “Vehicular homicide is the killing of a human being caused proximately or caused directly by an offender engaged in the operation of . . . a motor vehicle . . . whenever” drunk driving.

Maryland. Md Crimes and Punishments Code 27-388A: “Any person causing the death of another as a result of the person’s negligent driving, operation or control of a motor vehicle while intoxicated. . . .”

Massachusetts. ALM GL ch 90, § 24G(a): “or by any such operation so described causes the death of another person.”

Minnesota. MS 609.21(1): “if the person causes the death of a human being . . . as a result of operating a motor vehicle.”

Mississippi. MCA 63-11-30(5): “who operates any motor vehicle in violation of [the drunk driving] provisions . . . and who in a negligent manner causes the death of another . . .”

Missouri. MRS 565.024(1)(2): “While in an intoxicated condition operates a

motor vehicle in this state and, when so operating, acts with criminal negligence to cause the death of any person.”

Nebraska. NRS 28.306(3): “if the proximate cause of the death of another is the operation of a motor vehicle.”

Nevada. NRS 484.3795: “and does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle . . . , if the act or neglect of duty proximately causes the death of . . . a person other than himself . . . .”

New Hampshire. NHRS 630:3: “when in consequence of being under the influence of intoxicating liquor . . . while operating a propelled vehicle . . . , he causes the death of another.”

New Jersey. NJS 2C:11-5(a): “Criminal homicide constitutes vehicular homicide when it is caused by driving a vehicle or vessel recklessly.”

NJS 2C:11-5(b): “If the defendant was operating the auto . . . while under the influence of any intoxicating liquor . . . .”

NJS 2C:2-3(a): “Conduct is the cause of a result when: (1) It is an antecedent but for which the result in question would not have occurred; and (2) the relationship between the conduct and result satisfies any additional causal requirements imposed by the code or by the law defining the offense.”

New Mexico. NMR 66-8-01: “A person who commits homicide by vehicle while under the influence of intoxicating liquor . . . .”

North Carolina. NCGS 20-141.4(a)(1): “if he unintentionally causes the death of another person while engaged in the offense of impaired driving . . . and the commission

of that offense was the proximate cause of death.”

Ohio. ORC 2903.06(1)(a): “No person while operating . . . a motor vehicle . . . shall cause the death of another . . . as the proximate result of” drunk driving.

Pennsylvania. 75 Pa CS 3735: “Any person who unintentionally causes the death of another person as the result of [drunk driving]. . . when the violation is the cause of death.”

Rhode Island. RIGL 31-27-2.2(a): “When the death of any person other than the operator ensues as a proximate result of an injury received by the operation of any vehicle, the operator of which is under the influence of any intoxicating liquor . . . .”

South Carolina. SC Code 56-2945: “and when driving does any act forbidden by law or neglects any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes . . . death to a person other than himself.”

South Dakota. SDCL 22-16-41: “A person who, while under the influence of any alcoholic beverage . . . without design to effect death, operates or drives a motor vehicle of any kind in a negligent manner and thereby causes the death of another person.”

Tennessee. TCA 39-13-213(a): “the reckless killing of another by the operation of an automobile . . . (2) as the proximate cause of the driver’s intoxication.”

Texas. TPC 19.05(a)(2): “by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual.”

Utah. UCA 76-5-207: “if a person operates a motor vehicle in a negligent manner causing the death of another” while drunk driving.

Vermont. 23 VSA 1210(e): “If the death of any person results from a violation of” drunk driving.

Virginia. VC 18.2-36.1: “Any person who, as a result of driving under the influence . . . and intentionally causes the death of another person . . . .”

Washington. RCW 46.61.520: “as a proximate result of injury proximately caused by the driving of any vehicle by any person” drunk driving.

West Virginia. WVa C 17C-5-2(a)(2): While drunk driving “does any act forbidden by law or fails to perform any duty imposed by law in the driving of the vehicle, which act or failure proximately causes the death of any person . . . .”

WVa C 17C-5-2(a)(3): “Commits the act or failure in reckless disregard of the safety of others, and when the influence of alcohol . . . is shown to be a contributing cause to the death . . . .”

Wisconsin. WS 940.09(1)(a): “Causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.”

Wyoming. WS 31-5-1117(a): “Whoever while driving any vehicle under the influence of either intoxicating liquor . . . to a degree which renders him incapable of safely driving a vehicle, causes the death of another person . . . .”

**Admissibility of statement** – The existence of the statutory duty under this subsection does not dispense with the onus upon the Crown to establish that any statement made was not otherwise involuntary: *R. v. Fex* (1973), 14 C.C.C. (2d) 188, 23 C.R.N.S. 368 (Ont. C.A.), and *R. v. Cleavelly* (1966), 49 C.R. 326, 57 W.W.R. 301 (Sask. Q.B.). *Contrary* *R. v. Smith* (1973), 15 C.C.C. (2d) 113, 25 C.R.N.S. 246 (Alta. C.A.).

**Presumption of intent [subsec. (2)]** – This subsection is to be read disjunctively and thus the presumption applies where the accused fails to perform any of the three duties imposed on him: *R. v. Roche*, [1983] 1 S.C.R. 491, 3 C.C.C. (3d) 193, 34 C.R. (3d) 14 (7:0).

As to the meaning of the phrase “in the absence of any evidence to the contrary”, see *R. v. Proudlock*, [1979] 1 S.C.R. 525, 43 C.C.C. (2d) 321, 5 C.R. (3d) 21, noted under s. 348 *infra*.

Evidence which is not rejected by the trier of fact and which tends to show that the accused may not have had the requisite intent is evidence to the contrary. Evidence of drunkenness may constitute evidence to the contrary: *R. v. Nolet (Charette)* (1980), 4 M.V.R. 265 (Ont. C.A.).

Evidence that the accused, prior to walking away from the scene of the accident, was under the influence of alcohol and unresponsive to questions was capable of being evidence to the contrary and thus rebut the presumption: *R. v. Adler* (1981), 59 C.C.C. (2d) 517, [1981] 4 W.W.R. 379 (Sask. C.A.).

**Constitutional considerations** – This subsection is not an unconstitutional infringement on the guarantee to the presumption of innocence in s. 11(d) of the *Canadian Charter of Rights and Freedoms*: *R. v. T.* (1985), 18 C.C.C. (3d) 125, 43 C.R. (3d) 307 (N.S. S.C. App. Div.); *R. v. Gosselin* (1988), 45 C.C.C. (3d) 568, 9 M.V.R. (2d) 290 (Ont. C.A.).

#### OPERATING WHILE IMPAIRED.

**253. Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,**

- (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
- (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood. R.S.C. 1985, c. 27 (1st Supp.), s. 36; c. 32 (4th Supp.), s. 59.

#### CROSS-REFERENCES

The terms “motor vehicle” and “railway equipment” are defined in s. 2. The terms “aircraft”, “vessel” and “operate” are defined in s. 214. The presumption respecting “care or control” is found in s. 258(1)(a). Procedure for making a breathalyzer or approved screening device [A.L.E.R.T.] demand is found in s. 254 and for obtaining a warrant to obtain blood samples in s. 256. The adverse inference respecting the impaired offence for failing to comply with a demand under s. 254 is found in s. 258(3). The presumption respecting the accused's blood alcohol level arising from analysis of a breath sample or blood sample is found in s. 258(1)(c) and (d). Procedure for admission of certificate of an analyst, qualified technician and medical practitioner is in s. 258(1)(e) to (i) and (6) and (7).

The punishment for these offences is set out in s. 255. Evidence that the accused's blood alcohol level exceeded .16 at the time of the offence is deemed to be an aggravating factor, for purposes of sentencing, under s. 255.1. Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. Where the accused is charged with impaired operation causing death

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**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

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**PEOPLE OF THE STATE OF MICHIGAN,**  
**PLAINTIFF-APPELLANT,**

**v**

**JAMES RICHARD LARGE,**  
**DEFENDANT-APPELLEE.**

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**SUPREME COURT NO. 127142**  
**COURT OF APPEALS NO. 253261**  
**LOWER COURT NO. 03-000895-FH**

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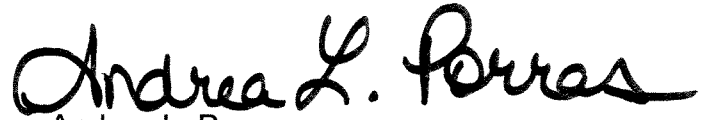
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Andrea L. Porras states that on the 24<sup>th</sup> day of January, 2005, she served a  
copy of **APPELLANT'S BRIEF** upon:

**JOHN P. KOBRIN**  
**ATTORNEY FOR DEFENDANT-APPELLEE**

at the above address by First Class Mail with postage fully prepaid.

A handwritten signature in black ink that reads "Andrea L. Porras". The signature is written in a cursive style with a large, looped initial "A".

Andrea L. Porras  
Legal Secretary